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IN THE

Supreme Court of the United States

October Term, 1935

No. 696

CHICAGO GREAT WESTERN RAILROAD COMPANY, a corporation,
Petitioner,

vs.

MARY RAMBO, as Administratrix of the Estate of ROY C. RAMBO, deceased,
Respondent.

PETITION FOR RE-HEARING.

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PETITION FOR RE-HEARING.

Respondent respectfully petitions the court for a re-hearing upon the following grounds:

I. The court is seriously mistaken upon the facts, as appears from the opinion which contains statements directly contrary to clear, undisputed testimony in the record.

II. The court failed to consider important undisputed evidence which in itself was sufficient to support the verdict of the jury.

III. The opinion of the court is directly contrary to the decisions of this court governing the review of questions of fact.

IV. The decision of the court, directly contrary to the facts and the law, results in tragic injustice to the dependents of decedent.

I.

THE COURT IS SERIOUSLY MISTAKEN UPON THE FACTS AS APPEARS FROM THE OPINION WHICH CONTAINS STATEMENTS DIRECTLY CONTRARY TO CLEAR, UNDISPUTED TESTIMONY IN THE RECORD.

The opinion of the court in holding that the verdict of the jury, as affirmed by the trial court and Supreme Court of Minnesota, is based upon conjecture, discusses two portions of the evidence. As to both portions the opinion indicates that the court is mistaken upon the facts.

In refusing to permit the jury to give any weight to the testimony of the engineer, the opinion of the court makes this surprising statement:

> "Simply because the engineer failed to see some object 800 feet ahead, does not show that he could not have seen so far; his attention might have been directed to points nearer to him or momentarily diverted. How far ahead he was looking does not appear."

This statement is directly contrary to clear undisputed testimony in the record. On page 235 of the record we find this statement of the engineer given to the claim agent of the appellant shortly after the accident.

> "I saw the object ahead just as quick as I could see it with the aid of the headlight and was looking ahead all the time."

Likewise on page 175 of the record, we find this testimony of the engineer while being examined by counsel for the appellant:

"Q. Were you doing anything which would give you accurate information as to how far that object was from you?

A. I was just looking straight ahead.

Q. Were you looking straight ahead at all times?

A. Yes."

and again on page 53 of the record:

"Q. Were you looking ahead immediately before you saw what appeared to be a couple of dogs?

A. Absolutely.

Q. Were you looking ahead at all times from the time you rounded the curve until you hit the speeder?

A. Yes.

Thus on three separate instances in this record the statement of the court is directly and unequivocally refuted.

Can it be said as a matter of law that the jury shall not be permitted to believe this testimony when there is not one word of testimony to the contrary in the entire record?

The incorrectness of the court's statement is further demonstrated by the repeated testimony of the engineer that when he first observed the object upon the track it appeared to be a couple of dogs, when in fact it was a four wheel speeder with a seat and platform hip-high, and a man seated erect upon it.

The other portion of the evidence discussed by the court is the testimony of the fifteen year old farm boy. The opinion does not fairly state his testimony and contains this statement which appears to be a mistake:

"Saw train 'about a hundred feet or so' before it struck speeder, headlight beaming, man sitting down on speeder."

On page 78 of the record, we find this cross-examination of the boy by counsel for the appellant apparently endeavoring to distort the boy's previous testimony:

"Q. And you first saw the train when it was 100 feet from the speeder?

A. No, at the (that) time I first saw the speeder I saw the train when it was on the underground crossing."

The boy had previously testified clearly and definitely that he had heard the speeder but had not seen it until the train was within 100 feet of it. His testimony on Page 76 on cross-examination was as follows:

"Q. How far was the motorcar from the train when you first saw the motorcar?

A. About three-fourths length of a telephone pole.

Q. I beg your pardon?

A. About three-fourths of a length of a telephone pole in between telephone poles.

Q. How far would that be?

A. I do not know.

Q. I think you testified as to various distances here accurately. Now, can you not tell me about how far this speeder was from the engine when you first saw the speeder? I am not trying to pin you down to exact feet, but what is your best judgment as to distance?

A. About a hundred feet or so.

* * * * *

Q. That headlight completely flooded the man and speeder with light?

A. It was not very plain."

and on page 75, the boy testified:

"Q. Where was the train when you first noticed the lights of the train?

A. About by the underground crossing."

Exhibit "E" shows that this crossing is at least more than 500 feet before the place of the collision.

This witness further marked upon plaintiff's Exhibit "C", the relative position of the train and the speeder when he first saw the speeder ahead of the train, with a number 1. A number 2 mark was made showing where the speeder was at that time, a distance which as observed on the photograph, considering the distance between the posts to be 175 feet, is a distance of approximately 100 feet. Then the point at which the collision occurred is indicated by the point at which the boy is standing in the picture, which is a matter of perhaps forty feet farther down the rail where the train overtook the speeder (R. 70). As the pictures disclose, this accident unfolded before this young man upon the raised elevation of the track. He testified clearly as to his observations and could not be tripped up upon cross-examination. In fact he had given the claim agent for the railroad a signed statement the day following the accident in which he stated:

"It was too dark to see the motor car when I first heard it, but when the train got closer I could see the motor car in the glare of the headlight."

It is significant to note that the boy heard the whistle and saw the sparks begin to fly from the wheels while the train traveled this last 100 feet, which, taken in connection with the testimony of the engineer, indicates that the boy saw the speeder ahead of the train about at the same time that the engineer was able to see it, and as the boy testified, even then

"it was not very plain." Certainly a headlight on a locomotive which would meet the statutory test of enabling the engineer to see an object as large as a man 800 feet away, should cause an object as large as we are here concerned with to stand out in bold relief at the very short distance of 100 feet. In fact the headlights of an automobile with their range of visibility placed by most states at 200 or 300 feet will completely and plainly flood with light an object even more than 100 feet away. The headlights on a locomotive are required to be approximately three or four times as powerful.

It is submitted that the direct testimony of the boy of what he observed was proper evidence for the jury to consider and the jury should not be required as a matter of law to disregard his testimony. This is particularly true when we note that there is not a scintilla of evidence to the contrary.

II.

THE COURT FAILED TO CONSIDER IMPORTANT UNDISPUTED EVIDENCE WHICH IN ITSELF WAS SUFFICIENT TO SUPPORT THE VERDICT OF THE JURY.

We submit that upon the record, the jury was entitled to conclude that the engineer was looking ahead to the outer range of his vision with the aid of the headlight, and did see the object as quickly as he was able to see it.

The record further is clear and uncontroverted that immediately upon seeing the man upon the speeder, the engineer applied his brakes in emergency, sanded his wheels, and stopped the train (R. 52). This testimony is repeated (R. 56, 57 & 58).

This immediately points out with inescapable logic that the point at which the brakes were applied, and the point at which the engineer discerned the man upon the speeder, are the same. It is our contention that under the evidence in this record, the jury could very properly and in fact almost inescapably conclude that the brakes were not applied until the locomotive was less than 100 feet from the speeder, and that hence the light was so deficient that the engineer could not distinguish the man and the speeder until within 100 feet of them.

Let us consider this evidence step by step.

The engineer testified that the train was traveling at a speed of sixty miles an hour and that he kept the brakes on emergency until he came to a stop (R. 58, 55). This was the maximum speed permitted on this track (R. 192). This is undisputed. It is also undisputed that the train traveled 2300 feet *beyond the point where it overtook the speeder.*

The appellant conducted some very exacting brake tests with the same equipment, at the same spot, with the same engineer applying the brakes in the same manner, the train going at the same speed (R. 59, 60, 184, 185, 183) and on these occasions the train traveled 2170 and 2210 respectively *from the point where the engineer was flagged*, that is, given the signal to apply the brakes.

Was not the jury entitled to consider these portions of evidence in their relation to each other? What conclusion does it lead to? Obviously the brakes of the locomotive on the night of the fatal collision were not applied until the moment of the crash. At least they were not applied more than 100 feet before the crash, as this would already be allowing a latitude of some 200 feet.

Could not the jury then properly conclude that the engineer did not distinguish the decedent upon his speeder until within 100 feet of him, and that the reason therefore was the deficiency of the headlight of the locomotive at that time.

In other words, the point at which the engineer received the impulse to apply the brakes for the test would correspond to the point at which the engineer received the impulse (that is distinguished the man on the speeder) on the night of the fatal collision.

The experts and the tests say that the impulse was received about 2200 feet from the point where the train stopped. The train went 2300 feet beyond the point of collision. Does this not mean, or at least is it not proper for the jury to conclude, that the engineer did not receive the impulse until practically the second he hit the speeder, and that the reason was that the headlight did not comply with the requirement?

The force of this logic is even more apparent when we realize that if the headlight did comply the brakes would have been set when the train and speeder were 800 feet apart, and with the speeder moving in the same direction at a speed of 20 miles per hour the train would travel more than 1400 feet with its brakes set before it overtook the speeder.

The conclusion which this scientific and mathematical evidence supports is also strongly corroborated in an independent manner by the testimony of the boy. He testified that the sparks began to fly from the wheels of the train about one rod from the speeder. This is a direct corroboration that the brakes were not applied until practically the moment the collision occurred. It again supports the verdict of the jury that the headlight was deficient at the time of the accident.

The testimony of the fireman also strongly supports the conclusion of the jury that the headlight did not comply.

Having in mind the undisputed testimony of the engineer that he applied the brakes immediately upon distinguishing the speeder and the man we find the fireman stating definitely that to him the crash with the speeder, the grinding of the wheels over the speeder, *the application of the brakes* and the toot of the whistle, all seemed to come together (R. 44). Under the evidence in the case the logical conclusion from this testimony is again that at the time of the accident the headlight was so deficient that the engineer was unable to distinguish the man on the speeder until practically the moment he hit it or within 100 feet of it, and consequently the brakes were not applied until that time.

Can it be said as a matter of law that a jury shall not be permitted to conclude from all of this evidence that the light was deficient? Can these logical conclusions be lightly put aside as based upon conjecture?

Is not every step, every piece of the logical whole a fair statement of undisputed evidence in the record? We respectfully submit that undisputed evidence in itself sufficient to support the verdict in this case was disregarded by the court.

III.

THE OPINION OF THE COURT IS DIRECTLY CONTRARY TO THE DECISIONS OF THIS COURT GOVERNING THE REVIEW OF QUESTIONS OF FACT.

The principle of review of issues of fact upon appeal was again and ably stated in the case of *Meyers vs. Pittsburgh Coal Company*, (1914) 233 U. S. 184, 34 Sup. Ct. 559, 68 L. Ed. 906.

> "Unless the testimony was such that no recovery can be had upon the facts shown, in any view which can be

properly taken from them, the verdict and judgment of the district court must be affirmed."

We submit that in direct contradiction of this rule the decision of the court interprets the evidence in accordance with its own view rather than from the light of what views may properly be taken of the evidence.

The case of C. M. St. Paul and Pacific Railway Company v. Coogan, 271 U. S. 472, 70 L. Ed. 1041, which the court refers to, does not alter this well recognized rule. In that case the court stated:

> "It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding."

The facts of the *Coogan* case are clearly distinguishable. As the court pointed out in that decision:

> "As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not themselves presumed."

In direct contrast to that situation, we have in the instant case not only direct testimony, but all the circumstances are proved by competent evidence, and the direct testimony, together with the circumstances, all strongly and substantially support the conclusion that the headlight did not comply at the time of the accident.

An example of the treatment of the evidence by the court in its opinion, which is directly contrary to the treatment to which the evidence is entitled upon appeal, is found in the discussion in which the court refused to permit the jury to

give the testimony of the engineer any weight. We find this statement of the court:

> "Evidently his (the engineer's) statements were merely guesses under the circumstances, accurate estimates of distances by him was impossible."

Is this not a statement such as one juror might make to another in an argument over the case? Can it be said as a matter of law that an engineer of long experience cannot tell the difference between six car lengths and sixteen car lengths while traveling sixty miles an hour?

In other words, can it be said as a matter of law that a motorist cannot tell the difference between a distance of more than two city blocks, or of less than one city block, while traveling sixty miles an hour?

This complete disregard of the testimony of the appellant's own engineer as a matter of law, is even more disheartening when it is observed that every other portion of evidence in the case indicates that in fact even the shortest distance testified to by the engineer was an exaggeration, and that the correct distance was 100 feet or less.

None of the so-called light tests were conducted on the statutory basis and none were conducted by impartial observers or with any particular care.

The indirect evidence secured from defendant's employees might well be more accurate and reliable than their direct testimony under such circumstances.

The case of Line v. Erie R. Co., (C. C. A. N. Y. 1931) 47 F. (2d) 657 Cert. denied 289 U. S. 729, 53 S. Ct. 526, 77 L. Ed. 1478 is strikingly in point. Here the court permitted the jury to draw conclusions from the circumstances notwithstanding the direct testimony of the engineer to the contrary.

We respectfully submit that the review by the court of the evidence in this case was not in accord with the principles of appellate review of issues of fact, and was contrary to the decisions of this court in similar cases.

IV.

THE DECISION OF THE COURT, DIRECTLY CONTRARY TO THE FACTS AND THE LAW, RESULTS IN TRAGIC INJUSTICE TO THE DEPENDENTS OF DECEDENT.

We realize full well that a painstaking consideration of a case of this type is difficult for the court when concerned with momentous decision of nationwide import. We do not criticise the piecing together of sections of appellant's brief and of the opinion of the court below in the opinion. We do wish to submit, however, that to respondent and her dependents, this case is of greater importance than any other this court has considered.

We submit that the opinion and decision of the court is directly contrary to the principles of appellate review and to the facts of the case and results in a tragic injustice.

Wherefore, respondent respectfully prays a re-hearing before this court.

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South Saint Paul, Minn.

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AFFIDAVIT OF COUNSEL UPON PETITION FOR RE-HEARING.

STATE OF MINNESOTA,
COUNTY OF DAKOTA. } ss.

Harold E. Stassen does hereby certify and affirm that he is an attorney at law duly admitted to practice before the Supreme Court of the United States, that he is one of the attorneys in the above entitled matter; that he is presenting to the court a petition for re-hearing; that said petition is made in good faith and not for the purpose of delay.

Further affiant saith not save that he makes this affidavit and certificate pursuant to Rule 33 of the Rules of this court.

HAROLD E. STASSEN.

Subscribed and sworn to before me
this 16th day of May, 1936.

VIOLET A. STASSEN,
Notary Public, Dakota County, Minn.
My commission expires Jan. 8, 1942.
(SEAL)